No. 86 1486

Supreme Court, U.S.
FILED
MAR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
*Respondent,*

v.

MICHAEL THOMAS TIMMERMANN,
*Petitioner.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether the court of appeals' affirmance of the district court's denial of Petitioner's pre-trial request for a continuance due to the uncontested unavailability of a material witness violated Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution?

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## OPINION OF THE COURT BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is set forth verbatim in the Appendix ("Appx.") at 1-14.

## STATEMENT OF JURISDICTION

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was filed December 3, 1986. Pursuant to Fed. R. App. P. 35(b), 40, and 41, Petitioner timely filed a Petition for Rehearing or, Alternatively, Suggestion of Rehearing En Banc and Stay of Mandate that Petitioner was denied on January 15, 1987 (Appx. at 15-16). Petitioner's Motion for Stay of Mandate was denied February 13, 1987 (Appx. at 17-18). The mandate issued that day.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Sup. Ct. R. 17(c).

## STATEMENT OF THE CASE

On March 5, 1985, a jury was sworn and a trial commenced against ten defendants, including Petitioner, in the United States District Court of the District of Maryland. Defendants were charged with

conspiracy to distribute cocaine and separate substantive offenses. For three weeks, the Government introduced the testimony of five co-conspirators and numerous exhibits corroborating their testimony and arguably linking the defendants to the crimes charged.

On March 21, 1985, the Government called Special Agent Flannery, the case agent-in-charge, as a witness. During Special Agent Flannery's direct testimony, defendants moved for and were granted a mistrial. Joint motions to dismiss the indictment on double jeopardy grounds were denied. Retrial was eventually scheduled to commence on September 29, 1985.

On or about September 26, 1985, counsel for Jeffrey Harris, the central defendant, requested a continuance of his trial and a severance because only days before Harris had been committed to a psychiatric institute and would be unavailable for

trial. In a hearing in chambers, the district court granted Harris' motion and severed him from the trial of the remaining defendants. At the same time, the district court denied the joint requests of defendants for a continuance and Petitioner's oral motion for severance and ordered that the trial begin on September 29, 1985.

On September 29, 1985, Petitioner filed a written motion for continuance or, in the alternative, for severance in support of the oral motion made at the September 26, 1985 chambers conference (Appx. at 19-22). An affidavit in support of that motion was also filed (Appx. at 23-27). In those written submissions, Petitioner and his counsel explained that Harris had exculpatory testimony which he would have provided in a joint trial with Petitioner. More particularly, Harris, a co-defendant and the person alleged to be the link

between Petitioner and chief Government witness Alan Bozman, would have testified that he had known Petitioner through high school and beyond, that he has never sold cocaine to Petitioner nor had he ever seen Petitioner use cocaine, that at no time was Petitioner a customer of his, that he had given Bozman Petitioner's telephone number for the purpose of becoming manager in a developing hot tub business; and that he wanted Petitioner to manage the business because of Petitioner's previous managerial experience at a McDonalds restaurant. Thus, Harris' testimony was Petitioner's only direct evidence to rebut Bozman, who was the only witness to provide testimony concerning the pertinent narcotics transactions.

Following the retrial, Petitioner was convicted on all counts. Petitioner was sentenced to three years imprisonment with parole eligibility to be governed by 18

U.S.C. §4205(b)(2). A special parole term of three years was also imposed.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of the request for continuance by stating, "Timmermann did not attempt to subpoena Harris. There is no showing that had he been subpoenaed he would not have been available. He may not now complain of Harris' absence." (Appx. at 12).

## ARGUMENT

**The court of appeals' affirmance of the district court's denial of Petitioner's pre-trial request for a continuance due to the uncontested unavailability of a material witness violated Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution.**

The aforequoted ruling by the Fourth Circuit is erroneous for several reasons. First, by relying on counsel's failure to

subpoena Harris, the court of appeals based its judgment on an issue rejected by the district court and not raised by the Government pre-trial when the request for continuance was originally made. Second, contrary to the per curiam opinion, there was ample evidence in the record that Harris was unavailable inasmuch as the district court had ruled that Harris was unavailable and the Government conceded Harris' unavailability and objected to Petitioner's request for continuance during trial to determine Harris' availability. Third, by relying on matters occurring during trial, the Fourth Circuit ignored its previous holdings relevant to continuance motions. For these reasons, a writ of certiorari should issue and Petitioner's convictions should be reversed.

**A.**

The need for counsel to subpoena Harris

was not raised by the government pre-trial when the continuance was requested. In fact, the government conceded his unavailability for the duration of the trial. This was the basis for the government's opposition to the requested continuance. In the government's words, Harris' unavailability was the "law of the case." Furthermore, although Harris was not subpoenaed during the trial, Petitioner's counsel did request a continuance to determine Harris' availability. The government responded by indicating that subpoenaing Harris would be an exercise in futility.

Thereafter, despite having proceeded on the basis of Harris' unavailability at trial, the government later raised the subpoena issue post-trial during argument on the Petitioner's motion for new trial. Significantly, that was not the basis upon which the district court decided the

issue.

In United States v. Clinger, 681 F.2d 221 (4th Cir.), cert denied, 459 U.S. 912 (1982), the Fourth Circuit stated that five elements shall be examined where a defendant seeks a continuance to produce a witness: (1) who the witness is; (2) what the witness' testimony will be; (3) whether the testimony will be competent and relevant to the issues in the case; (4) whether the witness can probably be obtained if the continuance is granted; and (5) whether due diligence has been used to obtain the witness for the trial as set. Id. at 223 (quoting Neufield v. United States, 188 F.2d 375, 380 (D.C. Cir. 1941)). The district court grounded its denial of the continuance request upon the fourth factor. The Fourth Circuit, however, substituted its judgment for that of the district court and based its judgment on the fifth standard, i.e., a

lack of due diligence for failure to subpoena the witness. This was simply not an issue before the district court. In fact, the district court rejected it and that determination should not have been disturbed on appeal absent a showing of an abuse of discretion or, at the very least, a remand for further proceedings on the issue of due diligence.

Even if due diligence should have been considered, the appellate panel has misapplied it. The due diligence standard in Clinger is that associated with the timing of the request for the continuance pre-trial and not with the failure to subpoena a witness during trial. The continuance cases deal with "due diligence" in the context of the timing of counsel's request. See, e.g., United States v. Baldwin, 624 F.2d 1228, 1231 (4th Cir.) cert denied, 449 U.S. 1124 (1980). Here, the district court found

counsel to have moved "promptly." The request was made immediately upon learning of Harris' unavailability at the time the district court had found Harris unable to participate in the trial and when a severance was granted. To look, as the appellate court did, at trial proceedings ignores the very teachings of Clinger which focused on the district court's decision pre-trial and the circumstances that existed then.

Apparently, the court of appeals was satisfied that the other Clinger factors were satisfied, including the importance of Harris' testimony. The panel obviously concluded that Harris' testimony could be obtained if the continuance was granted, the very issue on which Petitioner based his requests and arguments below and the issue the district court decided. The Petitioner, however, was denied the ability to present his defense to a jury

because his counsel relied on the district court's ruling of unavailability, the government's representation that such a ruling was the law of the case, and the government's opposition to a mid-trial continuance to determine availability. The Fourth Circuit's opinion teaches counsel that such reliance is misplaced.

Manifestly, Harris' testimony squarely contradicted the only government witness who provided direct testimony against the Petitioner. It supported Petitioner's theory of the case and to have denied Petitioner the opportunity to present such testimony because of counsel's reliance on pre-trial rulings, government representations and the apparent futility of issuing a subpoena denied the Petitioner a fair trial, due process and effective assistance of counsel.

The result fashioned by the court of appeals not only ignores the record but is

fundamentally unfair. The panel's analysis denies Petitioner a meaningful opportunity to produce evidence which went to the heart of the government's case or even to determine more accurately when the evidence (Harris' testimony) would be available. Given the importance of Harris' testimony, the result was that the district court's "insistence upon expeditiousness in the face of a justifiable request for delay [rendered] the right to defend with counsel an empty formality." Unger v. Sarafite, 376 U.S. 575, 589 (1964).

B.

The district court repeatedly ruled that Harris was unavailable for the trial. In the most specific terms, it sta ed "the Court determined pre-trial that Mr. Harris was unavailable and might be for some time." Such a ruling was consistent with the facts of the case and the arguments of

the government. The government repeatedly conceded the appropriateness of the district court's factual finding - a finding that should not have been disturbed on appeal absent an abuse of discretion and went so far as to state that it was the law of the case. This finding was reiterated by the district court when, in granting bond pending appeal on the continuance issue, the Court noted, "the unavailable witness was not merely another witness, but was a co-defendant [Jeffrey Harris]..." (emphasis added). As events unfolded, Harris was not discharged from the psychiatric institute until shortly after the trial ended.

In the face of this record, issuing a subpoena for Harris would have been futile and would necessarily have resulted in the very situation the government objected to during the trial. To require the Peti-

tioner, as Fourth Circuit apparently would have him do, to subpoena Harris simply to learn what was otherwise apparent to all concerned would have been an exercise in futility. Additionally, as noted above, the government's objection to the continuance was not based upon the need for defense counsel to subpoena Harris but was based on the pre-trial determination by the Court that Harris would be unavailable for the pendency of the trial.

C.

The Fourth Circuit's opinions instructs Petitioner's counsel to ignore both Court rulings and government representations. Moreover, to require Petitioner's counsel to issue a subpoena for Harris would require the very kind of mini-trial concerning his availability that the government represented at the time the issue was first raised that it was not prepared to engage in. The record

reflects that Petitioner's counsel moved promptly and with due diligence. Once Harris moved for severance and was declared unavailable, Petitioner immediately requested a continuance. This request was reviewed during the trial. At each point the government objected and the district court denied the request. Any fair reading of the transcript indicated that even had counsel sought to subpoena Mr. Harris, it would have been evident that the government would have objected and the same end result would have occurred. Having been denied the opportunity to subpoena Harris to determine his unavailability, counsel cannot now be faulted for not in fact doing it.

Lastly, issuing a subpoena is not a prerequisite for having a continuance granted. In the case most strikingly similar to this one, Shirley v. North Carolina, 528 F.2d 819, 821-23, (4th Cir.

1975), defense counsel attempted to "negotiate" for the attendance of the crucial witness. He was diligent but unsuccessful. No subpoena, however, was issued. The appellate court did not decide that case on counsel's failure to subpoena or secure some other process to compel attendance. Rather, the Court looked at the importance of the testimony and its necessity in the search for the truth. The result should have been no different here. To require otherwise, as the panel does, elevates form over substance and denies the Petitioner the opportunity to present his case to the jury through the error of his counsel.

## CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision be reversed.

Respectfully submitted,

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March 16, 1987